LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 19 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted] 155

DONALD S. CREAMER, *Petitioner*

v.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

EDWARD L. MERRIGAN
GADSBY, MAGUIRE, HANNAH & MERRIGAN
Attorneys for Petitioner
929 Pennsylvania Building
Washington, D. C. 20004

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	3
Reasons for granting the writ	
I. Performance Evaluation Plans Under 5 U.S.C. 1121 Must Meet the Minimum Standards Prescribed by the Performance Ratings Act	13
II. The Veterans' Administration Action, Which Took Away Petitioner's Statutory Pay Increase After Same Lawfully Accrued to Him, Reduced Petitioner's Compensation in Violation of His Rights Under the Veterans' Preference Act	17
III. The Veterans' Administration Failed to Observe Its Own Regulatory Procedures and Hence the Adverse Action Against Petitioner Was A Nullity	19
IV. The Denial of the Pay Increase Herein Was Based On An Arbitrary, Capricious, Discriminatory, Unfair Performance Rating System, and It Was Thus Unlawful and Unconstitutional	21
Conclusion	22
Appendix A	1a
Appendix B	11a

CITATIONS

Cases:

Bell v. United States, 366 U.S. 393, 81 S. Ct. 1230	15, 22
Borak v. Riddle, D.C. Cir. 1944, 141 F. 2d 278, cert. denied, 323 U.S. 738	18
Chisholm v. United States, 149 C. Cls. 8 (1960)	18
Clark v. United States, 149 C. Cls. 838 (1960)	18

Page

Schechter Corp. v. United States, 295 U.S. 495 21
Service v. Dulles, 354 U.S. 363 20
United States v. Borden Co., 308 U.S. 188, 198, 60 S. Ct. 182, 188 15
United States v. Zacks, 375 U.S. 59, 67, 68, 84 S. Ct. 178, 182, 183 15
Vitarelli v. Seaton, 359 U.S. 535 26

STATUTES:

Federal Salary Reform Act of 1962 (5 U.S.C. 1121 (a)) 2, 11, 12, 18, 20

Performance Ratings Act of 1950 11
(5 U.S.C. 2001) 4, 13
(5 U.S.C. 2002) 8, 14, 15
(5 U.S.C. 2003) 8, 15, 16
(5 U.S.C. 2004) 5
(5 U.S.C. 2005) 4
(5 U.S.C. 2006) 6

Veterans' Preference Act of 1944, as amended (5 U.S.C. 863) 17

Pub. L. 87-793, 76 Stat. 847 5
Pub. L. 89-301, 5 U.S.C. 1121 (c) 6

MISCELLANEOUS:

Executive Order 11073 5

REGULATIONS:

Federal Personnel Manual (Ch. 531 Sec. 4-9) 5

Civil Service Commisson (5 C.F.R. 531, Sect. 407 (d)) 6

Veterans Administration Regulations (Interim Issue 5-169, dated 10/18/62) 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

DONALD S. CREAMER, *Petitioner*

v.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner, Donald S. Creamer, respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Claims in this case. Judgment was entered on February 18, 1966, and the Court's opinion and judgment were likewise dated February 18, 1966.

OPINION BELOW

The opinion of the Court of Claims is not yet officially reported. It is, however, printed in full in Appendix A to this petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1255, which provides that cases in the Court of Claims may be reviewed by the Supreme Court by writ of certiorari on petition of claimant.

QUESTIONS PRESENTED

This case presents three questions of great importance to all classified federal employees and to all federal employees entitled to the protections of the Veterans' Preference Act of 1944, as amended. These questions are as follows:

1. Can a federal agency arbitrarily use a Performance Evaluation Plan which has never been submitted to or approved by the Civil Service Commission, as required by the Performance Ratings Act of 1950 and which does not otherwise comply with the standard minimum requirements of that Act, to rate or evaluate the work performance of its federal employees and capriciously to deny them their statutory pay increases?

2. Can a federal agency, *in violation of its own Regulations* and of the statutory protections afforded to veteran-federal employees by the Veterans' Preference Act of 1944, reduce or deny an increased rate of compensation which has already accrued in favor of such an employee and simultaneously deprive him of his statutory right of appeal to the Civil Service Commission?

3. Whether the "Acceptable Level of Competence" provisions of the Federal Salary Reform Act of 1962 (5 U.S.C. 1121 (a)), as here arbitrarily applied to deprive petitioner of an accrued statu-

tory increase in pay, violate Article I, Sections 1 and 8 of the Constitution and the Fifth Amendment to the Constitution?

STATUTES INVOLVED

The pertinent provisions of the statutes involved are set forth in Appendix B, pp. 11a-15a.

STATEMENT

Petitioner, an attorney at law, served as a federal employee almost continuously since 1934—i.e. for approximately 30 years. During the last 20 years of his employment, he held a position as an attorney with the Veterans Administration's Board of Veterans' Appeals. The Board has jurisdiction over all appeals arising from veterans' claims for benefits under the laws administered by the Veterans Administration (38 U.S.C. 4004); and decisions rendered by the Board are final (38 U.S.C. 4004 (a)).

Petitioner's principal duty for the Board was to draft and write proposed decisions for the Board itself. Because of his long experience, knowledge and skill, petitioner was regularly assigned only "the most involved and difficult cases"; those involving serious questions of law "for which there (were) no precedents" (*Govt. Ex. A*). The official Job Description covering petitioner's position also required him to perform his duties with "*no* technical supervision", and he was fully expected to "utilize his own initiative and judgment in evaluating evidence, in making findings of fact and reaching conclusions of law".

The Stipulation of Facts in the record herein shows that, although petitioner's work assignments were consistently difficult, complex and unique, his performance

ratings, certified by his superiors under the standards prescribed by the Performance Ratings Act of 1950 (5 U.S.C. 2001 et seq.) were always "Satisfactory or better". The term "satisfactory" is defined by the last mentioned Act as "corresponding to an efficiency rating of 'good' under the Veterans' Preference Act of 1944, as amended, and under laws superceded by this chapter" (5 U.S.C. 2005). The same Stipulation of Facts referred to above shows that petitioner continued to receive these same good performance ratings up to and including the date of his retirement from the federal service in December, 1964.

On June 23, 1963, however, prior to his retirement, petitioner completed the statutory waiting period prescribed by 5 U.S.C. 1121 to entitle him to an in-grade increase in pay of $365. per year, i.e. an increase from Grade GS 13d, $12,245. per annum, to Grade GS 13e, $12,610. per annum. *As stated above, petitioner's periodic performance and efficiency ratings were uniformly good up to and beyond that date, and at no time prior thereto had petitioner received any notice (such as that prescribed by the Veterans Administration regulations) that he would not be eligible for the said statutory increase.*

On June 26, 1963, however, several days after the statutory waiting period for the pay increase expired, one of petitioner's immediate superiors wrote to him stating that a decision had been reached that petitioner was not eligible for the said pay increase because his work performance allegedly was *not "of an acceptable level of competence"*. That ruling stemmed from the following developments: Prior to October 11, 1962, classified federal employees were entitled *automatically* to receive in-grade statutory increases in pay under

5 U.S.C. 1121 if, among other things, they possessed *"a current performance rating of 'satisfactory' or better"*. On October 11, 1962, however, Congress amended 5 U.S.C. 1121 *solely to the extent of substituting, in lieu of the last mentioned requirement, the condition that, in order to be eligible for the increase, the employee's work should be "of an acceptable level of competence as determined by the head of the department"* (Pub. L. 87-793, 76 Stat. 847).

The 1962 amendment, however, totally unlike the Performance Ratings Act of 1950 (5 U.S.C. 2004), failed to prescribe any minimum *"standards"* or *"requirements"* uniformly to govern the operation of these new performance rating procedures in all of the various federal agencies. Thus, on January 7, 1963, President Kennedy apparently felt constrained to issue Executive Order 11073, wherein he directed the Civil Service Commission (the same agency which administers the Performance Ratings Act) to "issue regulations and *standards*" to govern the operation of the "acceptable level of competence" ratings provided by the 1962 amendment.

Contrary to that Executive Order and long-standing procedures under the Performance Ratings Act, however, the Civil Service Commission failed completely to prescribe any *"standards"* of any kind to insure that the "acceptable level of competence" provisions of the 1962 Act would be fairly, uniformly and evenly administered by the federal agencies. *Instead, it simply announced in the Federal Personnel Manual (Ch. 531, Sec. 4-9) that the 1962 amendment provided the federal agencies with a new "valuable management device" for rating federal employees with or without "specific,*

established work standards", and the Commission stated:

> "When specific work standards have not been established, . . . work must be viewed in the light of other pertinent criteria . . ."

Moreover, without any basis or authority in the 1962 Act itself and contrary to the appeals procedures set forth in the Performance Ratings Act (5 U.S.C. 2006, wherein the Commission itself controls all agency performance rating appeals systems), the Civil Service Commission gratuitously announced further (5 C.F.R. 531, Sect. 407 (d)):

> "There is no right to a review by the Commission of a department's determination (of "unacceptable level of competence") . . ."[1]

Having received these odd pronouncements from the Civil Service Commission, petitioner's superior, the Chairman of the Board of Veterans' Appeals, announced that he would establish his own "guidelines and instructions for determining 'Acceptable Level of Competence'" (*Govt's. Ex. C*). He stated, first of all, that such determinations will be "separate and apart from annual performance ratings" (*Govt's. Ex. C*). *He then went on to say that "in the absence of (specific written) standards, responsible supervisors must base their determinations on the best information available to them"* (*Govt's. Ex. C*).

---

[1] As hereinbelow stated, Congress, in 1965 struck down this grossly improper, unlawful Commission regulation by expressly amending 5 U.S.C. 1121 to re-affirm the federal employee's absolute right of appeal to the Commission from any adverse finding of unacceptable competence (Pub. L. 89-301, 5 U.S.C. 1121 (c)).

The said announcement then went on to prescribe what it called "guidelines for use in determining whether an employee is performing at an acceptable level of competence" (*Govt's. Ex. C*). Stated as simply as possible, these "guidelines" were as follows:

> " . . . Performance at 100% *productive effectiveness* denotes the average expected for all legal . . . consultants as a group. . . . It is recognized that some individuals will produce either above or below this expected average . . .
>
> "On the other hand, *standards of quality* . . . are not based on the average. A rating of 100% *qualitative effectiveness* denotes "top quality" . . . It would be unusual if an employee ever reached 100% quality and maintained it over a substantial period." (Italics supplied)

The announcement then went on to provide these additional alleged "guidelines":

> 1. If an employee's overall efficiency index is 90% to 114%, including minimum productivity of 85% and quality of 80%, *a strong presumption exists in favor of granting a regular step increase.*
>
> 2. If an employee's overall efficiency index is 85-89%, including a minimum productivity and quality of 80%, an employee *"might qualify"* for a step increase; *"but there is no presumption in favor of entitlement".*
>
> 3. If an employee's overall efficiency index ranges between 75% and 84%, *a strong presumption exists that he does not qualify.* But, regarding these cases, petitioner's superior stated:
>
> "In this category, entitlement can be justified only by a showing of *exceptional circumstances* . . . "

The Board's announcement failed to specify how the various "efficiency indices" were to be computed, or by whom. And, it was silent as to how the "standards of productivity" and "standards of quality" were to be established, by whom and under what circumstances. In any event, all of these considerations were indeed superfluous because the very most any employee could ever earn under the rating system was *"a strong presumption"* that *"he might qualify"* for the periodic statutory increase provided by Congress; and even if he failed to qualify, his supervisor could still grant the increase if he were willing to allege the existence of "exceptional" circumstance. Indeed, under the Agency's Regulations, it was expressly provided (*Govt's. Ex. 7, pg. 2*):

> " . . . the determination should be made on the basis of the extent to which the employee meets these standards, *unless, there is other contradictory evidence.*" (Italics supplied)

It was thus on the basis of these exceedingly vague, shifting, conflicting and contradictory "guidelines" that the Deputy Vice Chairman of the Board of Veterans' Appeals finally decided on June 26, 1963, *several days after the statutory waiting period fixing petitioner's right to the statutory pay increase had expired,* that petitioner's work was not of an acceptable level of competence (*Govt's. Ex. 2*).

This finding, of course, was made exclusively on the basis of a performance rating plan which the Government admits was never submitted to the Civil Service Commission for approval in accordance with the requirements of 5 U.S.C. 2002, 2003, and same was never approved by the Commission (*Stipulation of Facts*

#2). And, of course, the Government also concedes that the finding was made *after* the aforementioned statutory waiting period expired—whereas the Veterans Administration's own Regulations expressly required (*Govt's Ex. 7, pg. 2*):

> *"Notification to Employees.* . . . Employees on whom a determination is made that performance is not of an acceptable level of competence must be so notified in writing . . . (*T*)*he notification shall be given prior to the date on which the time-in-grade requirements for within-grade step increase will be met* . . . " (Italics supplied)

In addition to the foregoing, the Board's late notification of June 26, 1963 (*Govt's. Ex. 2*) shows on its very face that petitioner's "10 months' *Cumulative Performance Record"* for the period just prior to June 1, 1963 fully entitled him, *after 30 years of federal service,* to favorable consideration, even under the Board's own arbitrary, capricious rating system.[2] The said Notice advised petitioner that his cumulative ratings for the said period were as follows:

Overall Index	Quality	Production
82.0	87.2	76.7

Comparing these figures with those specified in the Board's so-called "guide lines" (*Govt's. Ex. C*), the "Overall Index" figure of 82 is just 3 points short of the 85% level at which the "guidelines" say an employee "might qualify for regular within-grade promotion"; and 87.2 "Quality" figure is actually 7.2

[2] Especially since the Government also concedes that petitioner's ratings under the Performance Ratings Act were simultaneously "satisfactory or better."

above the 80% level at which it is stated "a strong presumption exists in favor of granting a regular within-grade promotion"; and the 76.7 "Productivity" figure is just 3 below the 80% at which an employee "might qualify" under the terms of the Board's system itself. Regarding "Quality", petitioner's overall average of 87.2 was not only good, it was excellent! Indeed, the Government's own exhibit shows that petitioner actually had a rating of 90 in "Quality" for one quarter and 91.7 for another. In this connection, of course, the Board's guidelines state (*Govt's. Ex. C, pg. 2*):

> "It would be unusual if an employee ever reached 100% quality and maintained it over a sustained period."

On the basis of this record, the Board clearly juggled and shaved the percentages under its own unapproved rating system to deprive petitioner of his lawful step increase in pay.

There is further sitpulated evidence in the record, however, to show that the Board's capricious, whimsical behavior did not end there. The Stipulation of Facts herein also demonstrates—

> (1) that other attorneys employed by the Board were granted their statutory pay increases under the Board's system at or about the same time petitioner's was denied, albeit their scores, under the Board's rating system, were substantially inferior to petitioner's; and
>
> (2) that petitioner himself was finally granted the statutory increase here in issue *one full year after it was due and owing,* although at that time

(in July, 1964) his cumulative scores under the Board's system were substantially lower than his cumulative scores up to May 31, 1963, when the adverse action was taken against him.[3]

Plaintiff, of course, thereafter filed suit in the Court of Claims under the provisions of 28 U.S.C. 1491. The parties thereupon filed cross-motions for summary judgment, and the Court of Claims decision dismissing the petition on the merits ensued.

REASONS FOR GRANTING THE WRIT

The Court of Claims has held that the "Performance Rating Act (has) nothing to do with plans or guidelines which may be used for determining an employee's 'acceptable level of competence' under the Federal Salary Reform Act of 1962"; and that, since the Performance Rating Act is inapplicable, "there was clearly no requirement that such plan or guidelines be presented to or approved by the Civil Service Commission" (*C. Cls. Opinion,* pp. 2, 3).

The court below also ruled that it was unnecessary for it to determine whether petitioner's statutory rights under the Veterans' Preference Act of 1944

---

[3] The Stipulation of Facts shows that petitioner's cumulative scores were as follows:

	Overall	Quality	Productivity
In 1963, when increase denied	82	87.2	76.7
In 1964, when increase granted	79.5	87.2	64.1

Of course, no one representing the Government has ever bothered to explain how "Quality" could remain at precisely 87.2 (down to the decimal point) over a full two-year period.

were violated when the Veterans Administration belatedly refused, on June 26, 1963, to accord him the statutory increase in pay which had accrued to him on June 23, 1963 under the terms of the Federal Salary Reform Act of 1962 (5 U.S.C. 1121), and the court thus failed to make any determination with respect to this important issue.

The Court of Claims also ruled that, albeit the Veterans Administration's own Regulations (Interim Issue 5-169, dated 10/18/62) specifically required that "Employees on whom a determination is made that performance is not of an acceptable level of competence *must* be so notified in writing" and that "the notification shall be given *prior to the date on which the time-in-grade requirements for within-grade step increase will be met*",—it was unnecessary for the agency in this instance to follow those requirements because petitioner "must have known" (from various informal on-the-job discussions and communications he had during 1962, *before the "Acceptable level of competence" provisions were even enacted by the Congress)* and in early 1963 "that unless his work improved markedly, he would not be given a step increase" (*C. Cls. Opinion,* pp. 4, 5). The Court therefore concluded that *"The delayed notice of June 26, can therefore be disregarded as out of time, and still the agency-regulation's insistence on a pre-June 23rd notification was accomplished"* (*C. Cls. Opinion,* pp. 5, 6).

Finally, the court below also ruled, in effect, that Congress, when it passed the 1962 "acceptable level of competence" amendment to 5 U.S.C. 1121, had for all practical purposes licensed federal agencies to use unlimited discretion and to be generally arbitrary and whimsical in the matter of performance evaluations.

In this regard, the court held "statistical tallies of work-production and work-quality" were appropriate measuring rods for professionals working for the Government—*"even for adjudicators"*; and that even where such mechanical evaluation plans are adopted, supervisory officials still have the unfettered right "to take into account other (unspecified) factors" and to operate entirely "open-ended" work measurement plans to rate the performance of its federal employees (*C. Cls. Opinion*, pp. 6, 7). Indeed, the court even ruled that because "the agency could *properly* consider elements other than the numerical indices", it did not violate petitioner's constitutional rights and it was not unlawfully arbitrary and capricious for the agency simultaneously to deny the statutory pay increase to petitioner and to grant it to other attorneys "with similar or lower scores" under the agency's announced performance rating system.

These holdings, we respectfully submit, are both patently erroneous and of importance to all classified federal employees and to all the federal agencies which must establish and maintain lawful and constitutional performance rating plans and which must lawfully and constitutionally administer the "acceptable level of competence" provisions of 5 U.S.C. 1121, as amended in 1962 and 1965.

I. Performance Evaluation Plans Under 5 U.S.C. 1121 Must Meet the Minimum Standards Prescribed by the Performance Ratings Act

The whole purpose of the Performance Ratings Act of 1950 is spelled out in 5 U.S.C. 2002. That law was passed by Congress to require each federal agency to "establish and use *one or more performance rating plans for evaluating the work performance of (its)*

officers and employees". Having enacted this requirement for each department, Congress specifically provided that *no such plan* was to be used and *no personnel action of any kind* was to be based on any such plan, *which had not first been submitted to and approved by the Civil Service Commission.* Congress likewise made certain that this *absolute prohibition* could not be evaded or avoided in the event the name, nature or purpose of any particular performance rating system was thereafter changed by law or administrative fiat. Consequently, 5 U.S.C. 2003 was enacted in such broad terms that its prohibition was expressly made to apply to *any and all unapproved performance rating plans "regardless of the name given to such rating".* In this connection 5 U.S.C. 2003 reads as follows:

> *"Other rating procedures prohibited*—No officer or employee of any department shall be given a performance rating, *regardless of the name given to such rating,* and *no such rating shall be used as a basis for any action, except under a performance-rating plan approved by the Civil Service Commission as conforming with the requirements of this chapter."* (Italics supplied)

Hence, we submit it to be clear that whether a federal employee's work performance be judged under the Veterans' Preference Act or the Federal Salary Reform Act of 1962 (5 U.S.C. 1121) or any other similar federal employee pay statute *which does not expressly preclude the applicability of the basic requirements of the Performance Ratings Act,* the latter is clearly apposite and the performance evaluation system used must (a) first be approved by the Civil Service Commission, pursuant to 5 U.S.C. 2003 and (b) it must meet the minimum "requirements for performance

rating plans" set forth in 5 U.S.C. 2004. This Court, of course, has consistently held that "It is a cardinal principle of (statutory) construction that repeals by implication are not favored", and that "When there are two acts upon the same subject, the rule is to give effect to both if possible" (*United States* v. *Borden Co.*, 308 U.S. 188, 198, 60 S. Ct. 182, 188; *United States* v. *Zacks*, 375 U.S. 59, 67, 68, 84 S. Ct. 178, 182, 183; *Bell* v. *United States*, 366 U.S. 393, 81 S. Ct. 1230).

In the case at bar, the Court of Claims' decision is directly contrary to that fundamental rule of federal statutory construction. Entirely absent any Congressional directive in the Federal Salary Reform Act of 1962 (5 U.S.C. 1121, the court below effectively repealed *by implication only* all of the statutory safeguards and protections of the Performance Ratings Act insofar as performance ratings for within-grade pay increases are concerned, and it ruled that each federal agency now possesses unfettered jurisdiction to adopt any "open-ended" work evaluation plan it might desire to rate the work performance of its civilian federal employees for pay increase purposes under 5 U.S.C. 1121.

The vital importance of this erroneous decision to federal employees throughout the Government is obvious. Until the decision in this case, it was verily believed that no performance rating system could be *"used as a basis for any (personnel) action"* until that system was first submitted to and approved by the Civil Service Commission (5 U.S.C. 2003); and if the Commission disapproved the system because it did not meet the basic requirements of the Performance Ratings Act, the system was forthwith to be revoked and discontinued (5 U.S.C. 2007). And inasmuch as 5 U.S.C. 2004 prescribed plain, simple minimum re-

quirements or standards to govern all such rating systems and since all had to be approved by the Commission, rating plans throughout the Government were generally uniform and easily understood by federal employees whose work performance was adjudged thereunder. Moreover, because of the express standards of 5 U.S.C. 2004, the performance of all federal employees under such systems necessarily had to *"be fairly appraised in relation to such requirements"* and there was no room for arbitrary or capricious agency behavior in performance evaluations. Now, however, by reason of the Court of Claims decision herein, each federal agency stands absolutely free to evaluate the work performance of its employees for the purpose of pay increase actions in almost any manner it pleases, and it can do this on the basis of any performance rating system it chooses to adopt, without the necessity of obtaining any prior approval from the Civil Service Commission.

All of this, of course, is not only directly contrary to the Congressional mandates so clearly set forth in the broadest possible terms in the Performance Ratings Act of 1950, but it also conflicts with the Congressional purpose underlying the recent 1965 amendment to 5 U.S.C. 1121 (Public Law 89-301), wherein Congress specifically directed the Civil Service Commission to establish "uniform procedures" to govern agency reconsiderations of adverse "acceptable level of competence" determinations, and that federal employees be entitled to appeal directly to the Civil Service Commission from all such adverse determinations.

In light of the foregoing, we respectfully submit that the administration of the entire federal pay increase system under 5 U.S.C. 1121 would immediately

be benefited if this Court would grant certiorari herein and reverse the decision of the Court of Claims; and thus direct that all "acceptable level of competence" ratings or evaluations, like all other federal employee work performance evaluations, are subject to the Performance Ratings Act, and that such evaluation systems, from the very beginning, must be approved by the Civil Service Commission and meet the basic requirements and standards prescribed by the Performance Ratings Act of 1950.

II. The Veterans Administration Action, Which Took Away Petitioner's Statutory Pay Increase After Same Lawfully Accrued to Him, Reduced Petitioner in Compensation in Violation of His Rights Under the Veterans' Preference Act

The record herein shows that petitioner is a veteran, entitled to all the statutory protections of the Veterans' Preference Act of 1944, as amended (5 U.S.C. 863). That statute provides that no veteran federal employee shall be reduced in compensation unless and until he receives 30 days' advance written notice, is given an opportunity to defend against such reduction, and in the event of an unfavorable ruling in the agency involved, he "shall have the right to appeal to the Civil Service Commission from (such) adverse decision".

Under the provisions of 5 U.S.C. 1121 (a), as amended in 1962, petitioner was lawfully entitled to "be advanced in compensation . . . *at the beginning of the next pay period following the completion of*" the prescribed time-in-grade. In the instant action, that occurred on June 23, 1963—and at that time, petitioner had received no written notice whatsoever (as required by the Veterans Administration's own Regu-

lations) that any determination had been made that his work was not of an acceptable level of competence.[4]

Thus, it has been petitioner's consistent position herein that, *absent the required advance notice of unacceptable competence,* the statutory pay increase, by the very terms of 5 U.S.C. 1121 itself, accrued to him on June 23, 1963. It has been petitioner's further position therefore, that once the said pay increase accrued, the Veterans Administration was powerless to revoke same or to reduce him to his old rate of compensation without full compliance with the provisions of the Veterans' Preference Act (See *Borak* v. *Biddle,* D.C. Cir. 1944, 141 F. 2d 278, cert. denied, 323 U.S. 738; *Chisholm* v. *United States,* 149 C. Cls. 8 (1960); *Clark* v. *United States,* 149 C. Cls. 836 (1960)).

The Court of Claims, of course, failed to reach this question at all because it erroneously ruled that on the basis of informal oral discussions and written memoranda which passed between petitioner and his supervisor in 1962 (*long before the "acceptable level of competence" provision was even written into 5 U.S.C. 1121 and before the applicable Veterans Administration regulation was even promulgated*) and during early 1963 (none of which involved the acceptable level of competence determination)—petitioner "*must have known* that, unless his work improved markedly, he would not be given a step increase". These oral communications and written memoranda,

---

[4] The Government, contrary to the ruling of the Court of Claims herein, readily concedes that the *advance written* notice required by the Regulations was not given (*Govt's Ex. 3,* pg. 3). In this regard, the Chairman of the Board of Veterans' Appeals admitted: "It follows that the Veterans Administration requirement of written notice 'before' the due date was not literally complied with".

none of which involved the rating issue involved, clearly do not constitute the advance written notification required by the Veterans Administration regulations, and, as stated before, *the Chairman of the Board of Veterans Appeals readily admitted that such notice had never been given prior to June 23, 1963, when the pay increase accrued to petitioner.*

Hence, other questions of great importance to all veteran federal employees under the Veterans' Preference Act and the Federal Salary Reform Act of 1962 are necessarily presented by this case. *Can a federal agency, by the simple device of failing to make any determination at all as to its employees' "acceptable level of competence," extend or prolong the statutory waiting period carefully limited by Congress in 5 U.S.C. 1121?*

Or, when a federal agency fails to make such a determination before the statutory waiting period expires, *does the pay increase thus automatically accrue upon expiration of the waiting period?* And, in the case of veterans' preference employees, can any such accrued pay increase thereafter be revoked by a federal agency without full compliance with the requirements of the Veterans' Preference Act?

III. The Veterans Administration Failed To Observe Its Own Regulatory Procedures and Hence the Adverse Action Against Petitioner Was a Nullity

As stated above, the Veterans Administration's applicable regulations emphasized that "Employees on whom a determination is made that performance is not of an acceptable level of competence *must* be so notified in writing", and such notification "shall be given prior to the date on which the time-in-grade requirements for within-grade increase will be met" (Interim Issue

5-169, 10/18/62). The record also contains the following plain admission by the Chairman of the Board of Veterans' Appeals (Govt's. Ex. 3, pg. 3):

> "The due date . . . was June 23. The Deputy Vice Chairman's memorandum was dated and delivered June 26, 1963. It follows that the Veterans' Administration requirement of written notice "before" the due date was not literally complied with."

This Court has consistently ruled that when a federal agency proceeds against one of its federal employees under its regulations, it must scrupulously follow the requirements of its own regulations or the adverse personnel action is a nullity (*Service* v. *Dulles*, 354 U.S. 363; *Vitarelli* v. *Seaton*, 359 U.S. 535).

Thus, this case presents a further important question to all federal classified employees as follows: Can a federal agency ignore or negligently avoid the requirements of its own regulations, and in the case of statutory in-grade pay increases, wait until after the pay increases are effective to notify employees that they are ineligible therefor? In light of the 1965 amendment to 5 U.S.C. 1121, such adverse determinations are now subject to reconsideration in the agency itself, and appeal to the Civil Service Commission (5 U.S.C. 1121 (c)). Should federal employees therefore be placed in a position by their own agency wherein all of these proceedings must transpire *after the statutory waiting period for the pay increase has expired? Or, more properly, should not this Court reverse the Court of Claims herein, and direct that where agency regulations require that such determinations be made prior to expiration of the statutory waiting period, they must be so made or be subject to nullification in the Courts?*

IV. The Denial of the Pay Increase Herein Was Based on an Arbitrary, Capricious, Discriminatory, Unfair Performance Rating System, and It Was Thus Unlawful and Unconstitutional

The Court of Claims recognized in its decision herein that "Mishandled discretion can, of course, be set aside" (*C. Cls. opinion,* p. 7). Still, it went on to rule again and again, as it approached the various examples of arbitrary, capricious shortcomings in the performance evaluation system here involved, that each was allegedly within the *"open-ended"* jurisdiction given to federal agencies by the 1962 Federal Salary Reform Act (5 U.S.C. 1121).

If the very brief and limited 1962 amendment to 5 U.S.C. 1121 is to be construed as authorizing each federal agency "to legislate at will" its own arbitrary standards for the granting or denial of federal statutory pay increases, then, we submit, the said 1962 amendment itself violates Article I, Sections 1 and 8 of the Constitution. In *Schechter Corp.* v. *United States,* 295 U.S. 495, this Court stated, at pages 529, 530:

> "The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the national legislature cannot deal directly. . . . But we said that the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, *cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained."* (Italics supplied).

Moreover, we submit that any rating system which admitedly arbitrarily and capriciously favors one federal employee over another with substantially the same or higher rating scores, solely because (as the Court of Claims found) the agency could properly consider elements not previously established or published, clearly discriminates against the latter employee and violates his property rights under the Fifth Amendment.

CONCLUSION

For the foregoing reasons, and because this case presents important statutory and constitutional questions with respect to federal civilian pay and performance evaluation systems (*Bell* v. *United States,* 366 U.S. 393, 395, 81 S. Ct. 1230, 1232), it is respectfully submitted that this petition for a writ of certiorari should be granted.

EDWARD L. MERRIGAN
Attorney for Petitioner
929 Pennsylvania Building
425 13th Street, N. W.
Washington, D. C. 20004

GADSBY, MAGUIRE, HANNAH & MERRIGAN
Washington, D. C.
Of Counsel